



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1802 OF 2000

FRANCIS K. MAINGI.....PLAINTIFF/APPLICANT

VERSUS

COOPER (K) LIMITED.....DEFENDANT/RESPONDENT

RULING

This suit was filed on 2nd November, 2000. In his plaint the plaintiff accused the defendant of breach of employment contract and deprivation of user of motor vehicle registration No. KAA 610 G for 248 days. He also asked for costs and interest. The defendant in its defence filed on 23rd January, 2001 denied the plaintiff's claim and asked for the dismissal of the suit. That suit remains undetermined to date.

On 27th February, 2015 this suit was flagged and listed for dismissal for want of prosecution under Order 17 rule 2 (1) and (4) of the Civil Procedure Rules. Counsel for the plaintiff then asked for another date so that an affidavit would be filed and served within 14 days. The court listed the notice to show cause for 24th April, 2016.

When the matter was called out on 24th April, 2015 aforesaid, both parties were absent. The court (Aburili J) noted that the plaintiff did not appear to show any cause why the suit should not be dismissed for want of prosecution. Consequently, the suit was dismissed.

By an application dated and filed on 28th September, 2018 the plaintiff seeks to set aside the said dismissal order and reinstatement of the suit, so that the same can be heard on merit. The reasons advanced for seeking the said orders appear on the face of the application alongside a supporting affidavit sworn by the plaintiff.

The application is opposed and there is an affidavit sworn by the Managing Director of the defendant to that effect. Both parties have also filed submissions. The reasons advanced by the plaintiff for the delay in the prosecution of the suit are that, he and his wife suffered long periods of ill health which resulted to the death of his wife.

This disoriented him and was not physically and psychologically in a position to execute his normal affairs, including the prosecution of this case. He further blamed his then advocate for the failure to protect his interest during that particular period, and was also unable to meet the legal expenses. He adds that he should be allowed to have his day in court, and that the defendant will not suffer any prejudice as it will still be in a position to adequately defend the suit.

On the other hand, the defendant states that it has searched through its records and due to passage of time, it is unable to find documents that would adequately respond to the allegations in the suit. The cause of action having arisen in 1998 or thereabout, it is the defendant's case that it will be almost impossible to secure an employee from that time, to testify on its behalf and therefore, to allow the application in favour of the plaintiff would incredibly prejudice the defendant. If the suit is reinstated great prejudice would be occasioned to the defendant as it has no witnesses who were employed at the time, and who would adequately respond to the allegations.

A summary of the plaintiff's cause of action is important in addressing this application. The plaintiff pleaded that he was employed by defendant as an accountant. The defendant guaranteed the purchase of motor vehicle registration no. KAA 610 G which was financed by National Industrial Credit. The said motor vehicle was registered in the names of the plaintiff, the defendant and National Industrial Credit.

The plaintiff further pleaded that, he contracted the said motor vehicle to a tour company for private hire earning Kshs. 6,000/= per day. The plaintiff's services with the defendant were terminated in February, 1998. Subsequently, the said motor vehicle was impounded at the instance of the defendant between 26th October, 1998 to 25th May, 1999 covering a period of 248 days. It is that action that led to the cause of action.

On the other hand, the defendant pleaded the motor vehicle was acquired for the official and personal use of the plaintiff on hire purchase basis. By the time the plaintiff was dismissed, he had not fully repaid the hire purchase price. The defendant was a stranger to the plaintiff's allegation that he hired out the motor vehicle for private hire. In any case, since the vehicle was for official use by the plaintiff, any contract for commercial use would be in breach of the agreement between the parties.

The unlawful termination of services was also denied and that it was proper, procedural and in terms of the contract of employment. The allegation that the motor vehicle was impounded and detained without lawful excuses was also denied, and in fact it was the defendant's case that the plaintiff surrendered the said motor vehicle on or about 23rd November, 1998 to enable the defendant sell the same to recover its rightful dues from the plaintiff. Any alleged loss was also denied.

It is generally the inclination of courts to maintain suits rather than dismissing the same. This is because an order for dismissal of any case is a drastic measure, which results in driving a party from the seat of justice without a hearing. In deserving cases however, the courts should not hesitate to do so, if maintaining the suit is likely to cause prejudice to any of the parties. This is because justice must look at both sides.

By the time the order of dismissal was given, the last entry in the record of this suit was made on 22nd May, 2008 when a notice of change of advocates was filed. A perusal of the court file shows that on 10th March, 2011 the plaintiff filed a notice of intention to act in person.

Although this was not minuted, by the time the suit was dismissed the plaintiff was in full control of his case. For five years or so that followed, he never took any action. The totality of the years that went by, from the time the suit was filed, to the time the dismissal order was made, is 15 years.

By any standard, that is inordinate delay. The copies of medical documents filed by the plaintiff and attached to the present application date from the year 2015 to 2018. The current advocate for the plaintiff came on board on 28th September, 2018, going by the Notice of Appointment filed on the same date. Where a court is persuaded that the delay, though inordinate is excusable, and a reasonable explanation has been offered, discretion may be exercised in favour of a party.

Going by the record herein, no reasonable explanation has been advanced by the plaintiff. Any party is entitled to fair hearing. The defendant has stated that due to the period that has gone by, it is not able to secure witnesses to defend the claim. In the case of **Fran Investment Limited vs. G4S Security Service Limited (2015) e KLR** the court stated in part as follows,

“..... a source of prejudice to the respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed will not allow any and is not conducive to having a trial in this matter.”

In the case of **Allen vs. Sir Alfred Alpine & Sons Limited (1968) 1ALL ER 543** the court held as follows,

“Where there is a substantial risk by reason of delay that a fair trial of the issues will no longer be possible or that grave injustice will be done to one party or the other, the court may dismiss the suit right away.”

I have related the pleadings of the parties herein, the attendant circumstances and the orders sought in this application. I observe in passing that, no documents were filed or exchanged relating to the hiring out of the car to a touring company, neither has the alleged tour company been identified. There is also no document to show the alleged earnings of Ksh.6,000/= per day. The success of the plaintiff's suit therefore, even if sustained, is highly doubtful.

I am persuaded that the orders sought by the plaintiff may not be granted without resultant injustice to the defendant. The degree of prejudice raised by the defendant is so high that, a fair trial shall be compromised. Any amount of costs shall not be adequate to dislodge the said prejudice. This case falls in the category of non-deserving the discretion of the court and the plaintiff therefore, has no one to blame but himself in the predicament he has found himself.

The order that commends itself in the circumstances of this case is that, the application is hereby dismissed but each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 5th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE